

JONES VARGAS  
100 W. Liberty Street, 12<sup>th</sup> Floor  
P.O. Box 281  
Reno, Nevada 89504-0281  
Tel: (775) 786-5000 Fax: (775) 786-1177

1 ANN MORGAN  
State Bar No. 933  
2 KENNETH K. CHING  
State Bar No. 10542  
3 JONES VARGAS  
100 West Liberty Street, 12th Floor  
4 P.O. Box 281  
Reno, NV 89504-0281  
5 (775) 786-5000  
6 MARK A. FINKELSTEIN  
NC State Bar No. 13187  
7 MATTHEW NIS LEERBERG  
NC State Bar No. 35406  
8 SMITH MOORE LEATHERWOOD LLP  
2800 Two Hannover Square (27601)  
9 Post Office Box 27525  
Raleigh, North Carolina 27611  
10 (919) 755-8700  
11 Attorneys for non-party  
Law Enforcement Associates, Inc.

12  
13 UNITED STATES DISTRICT COURT  
14 DISTRICT OF NEVADA

15 TASER INTERNATIONAL, INC.,  
16  
17 Plaintiff,  
18  
19 v.  
20 STINGER SYSTEMS, INC.; JAMES F.  
MCNULTY, JR.; AND ROBERT GRUDER,  
21 Defendants.

Case No. 2:09-CV-00289-KJD-PAL

**NON-PARTY LAW ENFORCEMENT  
ASSOCIATES' RESPONSE TO  
TASER'S MOTION TO COMPEL  
COMPLIANCE WITH SUBPOENA**

22 Pursuant to Local Rule of Civil Practice 7-2(b), non-party Law Enforcement Associates,  
23 Inc. ("LEA") serves these points and authorities in response to Taser's motion to compel  
24 compliance with subpoena, dated August 31, 2010 (Doc. No. 115).

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 **I.**

27 **Introductory Statement**

28 On August 19, 2010, counsel for Plaintiff issued a facially defective subpoena to the

JONES VARGAS  
 100 W. Liberty Street, 12<sup>th</sup> Floor  
 P.O. Box 281  
 Reno, Nevada 89504-0281  
 Tel: (775) 786-5000 Fax: (775) 786-1177

1 custodian of records for LEA—a small company based out of Raleigh, North Carolina. The  
 2 subpoena issued from the United States District Court for the Eastern District of North Carolina  
 3 and was served on LEA in North Carolina, but commanded LEA to produce documents in Arizona  
 4 several days later, in plain violation of Federal Rule of Civil Procedure 45(a)(2)(C). A mere four  
 5 days after LEA served objections to the subpoena (*see* Doc. No. 115, Ex. B), counsel for Plaintiff  
 6 filed the instant motion to compel—without ever consulting LEA to discuss a possible resolution  
 7 of the discovery dispute, and indeed without ever contacting LEA at all, in plain violation of Local  
 8 Rule of Civil Practice 26-7(b). Worse still, the instant motion was filed in the District of *Nevada*,  
 9 despite the longstanding requirement that such a motion to compel be sought from the court  
 10 issuing the subpoena—in this case, the Eastern District of North Carolina. *See* Fed. R. Civ. P.  
 11 45(c)(2)(B)(ii).

12 Now, non-party LEA has been forced to hire local counsel in Nevada to defend itself  
 13 against a *premature* motion filed in the *wrong* court to enforce a *defective* subpoena. If anyone is  
 14 entitled to relief—including payment of attorneys’ fees and costs—it is LEA. *See* Fed. R. Civ. P.  
 15 45(c)(1).

## 16 II.

### 17 The Subpoena Was Facially Defective from the Outset

18 The subpoena dated August 19, 2010 and issued to non-party LEA in North Carolina  
 19 commanded it to produce and permit inspection of various documents at Plaintiff’s counsel’s  
 20 office in Arizona, at 9:00 am on August 31, 2010. Of course, an attorney does not have the power  
 21 to make *anyone*, let alone a non-party, drive documents 2,000 miles for the attorney to inspect and  
 22 copy. Instead, the Federal Rules of Civil Procedure strike a different balance between liberal  
 23 discovery principles and protection of those receiving subpoenas: “A subpoena *must* issue as  
 24 follows: . . . (C) for production or inspection, if separate from a subpoena commanding a person’s  
 25 attendance, from the court for the district where the production or inspection is to be made.” Fed.  
 26 R. Civ. P. 45(a)(2)(C) (emphasis added). Plaintiff’s counsel could therefore only issue the  
 27 subpoena from the Eastern District of North Carolina if “the production or inspection is to be  
 28 made” in the Eastern District of North Carolina. The subpoena is therefore invalid on its face.

1 *See Kremen v. Cohen*, No. C 98-20718 JW, 2007 WL 1119396 (N.D. Cal. 2007) (finding  
2 subpoenas to be “defective on their face” because they were issued from the Northern District of  
3 California but required production in other districts in California).

### 4 III.

#### 5 **Plaintiff’s Counsel Never Consulted LEA, Let Alone Made a “Sincere Effort,” to Resolve** 6 **this Dispute Before Filing Its Motion to Compel**

7 Across the country, the federal and state courts have better things to do than mediate every  
8 squabble that might arise during the course of discovery. This Court expressly guards against  
9 such a waste of judicial resources by requiring that parties confer before invoking the court’s  
10 power and resources to resolve a discovery dispute:

11 Discovery motions will not be considered unless a statement of moving counsel is  
12 attached thereto certifying that, after personal consultation and sincere effort to do  
so, counsel have been unable to resolve the matter without court action.

13 Local Rule of Civil Practice 26-7(b); *see also* Fed. R. Civ. P. 37(a)(1) (requiring that a motion to  
14 compel “include a certification that the movant has in good faith conferred or attempted to confer  
15 with the person or party failing to make disclosure or discovery in an effort to obtain it without  
16 court action”).

17 Here, Plaintiff’s counsel did not include any such certifying statement in Taser’s motion to  
18 compel. This is because he cannot certify what is not true. After LEA served its objections to the  
19 subpoena, LEA did not hear from Plaintiff’s counsel again until it was served with the instant  
20 motion to compel. There was never any “personal consultation,” nor any “sincere effort . . . to  
21 resolve the matter without court action.” *See Shuffle Master, Inc. v. Progressive Games, Inc.*, 170  
22 F.R.D. 166, 171 (D. Nev. 1996) (noting that parties have satisfied the “confer” requirement only if  
23 they “personally engage in two-way communication with the nonresponding party to meaningfully  
24 discuss each contested discovery dispute in a genuine effort to avoid judicial intervention”).  
25 Instead, for whatever reason, Plaintiff’s counsel decided to waste this Court’s time and non-party  
26 LEA’s resources on a dispute that might very well have been resolved had Plaintiff’s counsel  
27 complied with the directives of this Court and the Federal Rules.

JONES VARGAS  
100 W. Liberty Street, 12<sup>th</sup> Floor  
P.O. Box 281  
Reno, Nevada 89504-0281  
Tel: (775) 786-5000 Fax: (775) 786-1177

## IV.

**This Motion to Compel Has Been Filed in the Wrong Court, Further Wasting LEA's and this Court's Time and Resources and Requiring the Imposition of Sanctions on Plaintiff's Counsel**

Even if Plaintiff's counsel had issued a proper subpoena, and even if he had bothered to discuss with LEA its objections before filing the instant motion to compel, Taser still could not prevail because Taser has filed the motion in the wrong court. Motions to compel compliance with a subpoena are governed by the Federal Rules:

At any time, on notice to the commanded person, the serving party may move *the issuing court* for an order compelling production or inspection.

Fed. R. Civ. P. 45(c)(2)(B)(ii) (emphasis added); *see also* Fed. R. Civ. P. 37(a)(2) ("A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.").

Here, the subpoena issued from the Eastern District of North Carolina. Any motion to compel should therefore have been filed with the Eastern District of North Carolina as the "issuing court." The rule exists to protect persons subject to subpoenas from the expense of having to defend themselves all over the country. This very purpose has been thwarted here. LEA has had no choice but to hire local counsel in Nevada to defend against this improper motion filed 2,000 miles away instead of defending it, if at all, three blocks down the street.

With the added power given attorneys to individually sign subpoenas comes added responsibility to use the power judiciously and with care. The Federal Rules codify the principle by subjecting careless counsel to liability for attorneys' fees:

A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

Fed. R. Civ. P. 45(c)(1). Without question, Plaintiff's counsel did not "take reasonable steps" to avoid imposing an undue burden on non-party LEA by issuing it a defective subpoena and then trying to enforce it 2,000 miles away without even picking up the phone to discuss the dispute. Under the mandatory language of Rule 45(c)(1), therefore, this Court "must enforce this duty and impose an appropriate sanction . . . on a party or attorney who fails to comply." For actions as

egregious as these, nothing short of the award of attorneys' fees to LEA to offset its defense of this motion and the quashing of the subpoena will sufficiently deter such conduct in the future.

V.

**LEA's Objections to the Subpoena Should be Sustained  
and the Motion to Compel Denied**

This court need not reach the merits of Plaintiff's counsel's premature and misplaced motion to enforce his defective subpoena. Indeed, much of Plaintiff's counsel's argument is severely undercut by the simple fact that the parties have not had the opportunity to negotiate a possible resolution of the dispute.

Taser served LEA with an overbroad subpoena unbounded by time and scope. For example, Taser commanded production of "[a]ll documents which reflect or relate to any communication between LEA and McNulty." (Doc. No. 115, Ex. A.) Faced with a short deadline, LEA timely served its objections while it continued looking through its records in response to the subpoena. Just four days later, Plaintiff's counsel filed this motion to compel. Had Plaintiff's counsel contacted LEA as the rules require, he would have learned that LEA was searching for responsive documents to try to find a middle-ground to Plaintiff's counsel's broad requests. Had Plaintiff's counsel contacted LEA as the rules require, he would have learned that the many requests relating to the actions of Paul Feldman, LEA's former President, are complicated by the fact that Mr. Feldman was terminated from LEA and has since engaged in a campaign of litigation to "ruin" LEA. Finally, had Plaintiff's counsel contacted LEA as the rules require, he would have learned more regarding the relationship between Mr. McNulty and LEA as it relates to LEA's claims of privilege.

///

///

///

///

///

///

1 In any event, Plaintiff's counsel is certainly not entitled to an award of attorneys' fees for  
2 filing a premature motion to compel before seeking to narrow the issues, or perhaps resolve the  
3 dispute entirely, by first conferring with LEA.

4 DATED this 17<sup>th</sup> day of September, 2010.

5 JONES VARGAS

6  
7  
8 /s/ Kenneth K. Ching  
ANN MORGAN  
State Bar No. 933  
9 KENNETH K. CHING  
State Bar No. 10542  
10 100 W. Liberty St, 12<sup>th</sup> Floor  
P.O. Box 281  
11 Reno, NV 89504-0281

12 MARK A. FINKELSTEIN  
NC State Bar No. 13187  
13 MATTHEW NIS LEERBERG  
NC State Bar No. 35406  
14 SMITH MOORE LEATHERWOOD LLP  
2800 Two Hannover Square (27601)  
15 Post Office Box 27525  
Raleigh, North Carolina 27611  
16 Telephone: (919) 755-8700  
Facsimile: (919) 838-8800

17  
18 Attorneys for non-party  
Law Enforcement Associates, Inc.  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

JONES VARGAS  
100 W. Liberty Street, 12<sup>th</sup> Floor  
P.O. Box 281  
Reno, Nevada 89504-0281  
Tel: (775) 786-5000 Fax: (775) 786-1177

**CERTIFICATE OF SERVICE**

I certify that I am an employee of JONES VARGAS, and that on this date, pursuant to FRCP 5(b), I am serving the attached NON-PARTY LAW ENFORCEMENT ASSOCIATES' RESPONSE TO TASER'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA on the parties set forth below by E-service effected by CM/ECF addressed as follows:

D. Chris Albright  
ALBRIGHT STODDARD WARNICK & ALBRIGHT, P.C.  
Quail Park I, Building D-4  
801 South Rancho Drive  
Las Vegas, Nevada 89106-3854  
dca@albrightstoddard.com

P. Sterling Kerr  
Marvin L. P. Simeon  
LAW OFFICES OF P. STERLING KERR  
2450 St. Rose Parkway, Suite 120  
Henderson, Nevada 89074

and by placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail at Reno, Nevada, postage prepaid, following ordinary business practices addressed as follows:

Mark A. Fuller  
Glen Hallman  
GALLAGHER & KENNEDY, P.A.  
2575 East Camelback Road  
Phoenix, Arizona 85016-9225  
maf@gknet.com

James McNulty  
106 Southern Highland Parkway, Suite 110  
Las Vegas, Nevada 89141

DATED this 17th day of September, 2010.

/s/ Melinda Poehlmann  
An Employee of Jones Vargas

JONES VARGAS  
100 W. Liberty Street, 12<sup>th</sup> Floor  
P.O. Box 281  
Reno, Nevada 89504-0281  
Tel: (775) 786-5000 Fax: (775) 786-1177